84-117

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LAWRENCE R. ROSANO, PETITIONER

v.

SECRETARY OF THE NAVY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether the right to abortion previously established by this Court is broad enough to include within it a corresponding duty on the part of everyone else in the nation to cooperate in the performance of abortions?

2. Whether medical advances of past decades are sufficient to limit right to abortion so as to grant relief to petitioner?

3. Whether Rosano, who objected to indirectly participating in abortion by paying medical insurance and received no substantial assistance from personnel employees in processing his complaint should have been fired when he claimed a right and duty to use government time and did use government time to try to establish a right for government employees to receive medical insurance without paying for abortions indirectly?

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TABLE OF AUTHORITIES

This petition does not rely on any authorities, but is rather a request for this Court to narrow the right to abortion previously granted by this Court in a series of decisions during the 1970's. The arguments will not comprise statutes, cases, etc., but will be

primarily scientific and historical. The terminology "Roe V Wade" is used herein to describe that right first defined by this Court in the case of the same name and refers to the right defined by that and succeeding cases which caused petitioner to make the choices described herein and not to the cases themselves and hence is not given a citation.

REFERENCE TO LOWER COURT OPINIONS

There are no lower court opinions. The Ninth Circuit disposed of this case by a two page memorandum filed May 3, 1984, which memorandum comprises the Appendix of this petition. The District Court had previously disposed of this case by granting a Motion for Summary Judgment by the respondent Secretary of the Navy.

GROUNDS OF JURISDICTION

i Date of Memorandum: Filed May 3, 1984, no other date.

ii No order respecting a rehearing or extension of time in which to petition.

iii No cross-petition filed at present.

iv In the District Court, petitioner relied on the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, including 1972 amendments, particularly Section 701(j)

42 USC Section 200 e (j). In addition, respondent Secretary of the Navy is an agency of the U.S. Government. It is believed the preceding also confer jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Other than those mentioned in the previous paragraph which petitioner relied on only for the purpose of placing jurisdiction in the District Court, there are none. This case arose because of the creation of a right to abortion by this Court and petitioner's objection that even assuming arguendo there was such a right, petitioner did not have to fund it.

STATEMENT OF CASE

Rosano believed on scientific, medical, religious and moral grounds that abortion kills human beings and that such killing is evil and that the U.S. Constitution does not require him or like-minded people to participate in such killing. Without sanction of Congress, bureaucrats had imposed on each federal employee the obligation to either indirectly pay for abortion via their medical insurance payments, thereby indirectly participating in abortion, or waving their federal employee right to medical insurance. Rosano upon hiring in November requested an accomodation. His request was refused and the applicable personnel employees refused to assist him in any meaningful way in processing his request for accomodation. For about six months, Rosano performed his duties and his job was not threatened. In April, the last possible federal personnel

employee informed Rosano he would not help, and this without Rosano's request or complaint for accomodation ever having been processed. Personnel claimed they did not know what to do and so would not help. Rosano then informed his supervisor that Rosano's request for accomodation was sufficiently serious so that it should at least be processed. Rosano said he would do it on government time. (Most government employees were not available before or after Rosano's working day.) Through the efforts of Rosano and others feeling similarly, and accomodation has been made so that what Rosano wanted is now government policy. Unfortunately for Rosano, when he told his supervisor he was going to take government time for his project, his supervisor replied that if he did, he would be fired. He did. About a month later he was fired and unsuccessfully sought relief via a contested hearing, and up to this Court.

(i) REASONS FOR ALLOWANCE OF WRIT

1. Rosano's actions and failures to act were excusable unless the rights of those opposing abortion are disfavored.

2. Technological advances since Roe V Wade[1] are sufficient so that, if necessary, Roe V Wade should be modified enough for Rosano to prevail.

3. Even in the absense of technological changes, Roe V Wade was a case in which a person favoring abortion opposed an agency (state attorney general) neutral on the abortion issue and not knowledgeable on the abortion issue and the arguments opposing abortion have never been presented in lower courts and considered by this Court and if these arguments are considered as it would seem due process requires, Rosano should prevail.

Discussions of Reasons

1. If Rosano were a woman complaining about sexual harassment or some other

gender based complaint and had received the same almost total lack of cooperation and almost total refusal to perform what purported to be their job as Rosano met in attempting to go through channels with his complaint, this case would not be here because there would have been a plaintiff verdict in the District Court which would not have been appealed. In like manner, if Rosano's complaint were based upon racial discrimination rather than as it was religious and moral discrimination, and everything else had been the same, Rosano would have prevailed in the lower court.

Rosano had at all times material hereto a strong religious, moral and scientific belief in the humanity of the unborn and in the catastrophic wrongness of abortion. For this reason, he did not want to participate in or aid abortion, even indirectly. As part of the con-

sideration for his civil service employment as an engineer, Rosano was entitled to receive medical insurance. Medical insurance was particularly important to Rosano because he was still suffering from the after effect of a previous serious auto accident, so waving medical insurance would have been a major sacrifice. Without any authorization by Congress, federal bureaucrats had imposed on all federal employees the obligation to have medical insurance, if at all, which covered abortion. This was reversed the year after Rosano was fired by the administration, possibly as a result of Rosano's efforts. No conscience clause was provided such as Congress has provided in areas where the request for a conscience clause has been made. No alternative insurance policies not having abortion coverage were provided, although such were available and alternative insurance

policies providing abortion coverage were available.

Rosano spent six months with minimal use of government time and substantial use of his own time in an effort to obtain relief. Those federal employees who had a duty to help him refused to process his claim and his complaint and refused to take those actions which they were bound by law to take. In April, Rosano was finally informed that these federal employees would take no action on his behalf and this refusal on their part to act came without the processing of his claim and complaint to which Rosano was entitled.

The Code of Ethics, passed by Congress, in general terms, requires an employee to take independent action under circumstances similar to those in which Rosano found himself.

Rosano informed his supervisor of the refusal of the employees with the duty

to process his claim and complaint to act and of Rosano's intention to take appropriate action as apparently required by the Code of Ethics. Rosano's supervisor informed Rosano that if he did he would be fired. Rosano did. Rosano was fired. Rosano's supervisor testified at a hearing which is part of the District Court record that Rosano would not have been fired except that after warning, Rosano persisted in claiming and exercising the right to use government time in an effort to modify the federal medical insurance policy relating to abortion coverage as it applied to Rosano and other like-minded conscientious objectors to abortion.

A variety of federal cases have held that employees have a right to act as Rosano did in protecting constitutionally or statutorily protected rights. Among these rights which have been favored are

sex, race, or religious or moral or reasons unrelated to abortion. Rosano's particular claim and objection has not been considered in any previous case so there is no previous case law establishing whether or not Rosano's problem fits into a catagory which the courts will protect.

2. Technological advances have led to substantially new knowledge probably exceeding all that was known about the unborn in 1973 and technological advances in medical technique and capability far in excess of what was available in 1973. In addition, as will be discussed later, Roe V Wade substantially misstated scientific knowledge and medical abilities in 1973.

Among the new technology are improvements in newborn environments which have made it possible for prematurely born fetuses to survive about six weeks earlier than what Roe V Wade stated was the earliest possible date of survival. This amounts to

a thirty-three and one-third percent exaggeration by Roe V Wade of the maturity required for fetal survivability.

Vast amounts of new knowledge have become available through ultrasound, fiber optics, and other technological advances. One would think that a doctor would know far more about abortion and the fetus than a justice, particularly if the doctor was an abortionist and even more particularly if the doctor was intellectually gifted to teach as well as practice and even more particularly if the doctor was America's leading abortionist and even more particularly if the doctor were the only M.D. in the inner circle of those who plotted and executed America's abortion revolution. Such a man was Bernard Nathanson who was convinced by the new knowledge that he had "in fact presided over 60,000 deaths."[2]

Nathanson has recently made public an ultrasound movie of a suction abortion.

He says the movie was made by an abortionist friend of his who quit doing abortions after seeing his own movie.[3]

The movie begins by showing the fetus in the womb making movements which could be characterized as exercising or perhaps even as playing. One sees the suction tip enter. The fetus observes and detects the suction tip and in a very human manner attempts to evade it. At first, the fetus appears to be winning. The fetus easily evades and stays away from the suction tip. But the suction tip is removing fluid and the volume in which the fetus can hide is constantly reduced. Finally the volume becomes so small that the fetus can no longer swim away and evade and hide and the suction tip contacts and pulls away by breaking off first a limb, then other fetal parts until the fetus is gone.

The actions and efforts and reactions of this tiny one inch long human being in

its futile effort to preserve its life do not seem to differ in any substantial way other than size and environment from those one would expect of a more mature human in a samilar scaled up environment. One might even hope that if a justice observed what Nathanson and his abortionist movie taking associate observed, they might react in a similar manner.

"Conceived in Liberty" also illustrates experiments done on fetuses about one inch long to ten weeks gestation. These fetuses are outside the womb. One sees needles or similar implements pricking the fetuses and the fetuses reacting by jumping away within their capabilities just as would a more mature human being. These movies leave little doubt that fetuses at about the age of abortions feel pain and one knows they receive no anesthesia and one wonders if the good accomplished exceeds this and other types of pain in abortion.

But not only has science improved viability and let us observe what before we could only imagine. A vast amount of new knowledge has become available, and all of it points to the closer similarity than previously thought between the unborn and the born and none of it supports Roe V Wade which was tried in such a manner as to suppress anti-abortion arguments.

3. Petitioner has lost in the courts below because of Roe V Wade which gave unborn unwanted human beings approximately the same rights as trash. Like trash, they can be kept and cuddled and loved or in the alternative flushed down a sewer or thrown out in a plastic bag or burned. As stated previously, if Rosano had taken the action he did in furtherence of a protectable right such as one based on sex or race, he would have probably prevailed, but Rosano was basing his claim on something that had no more rights than

trash so the government employees with a duty to assist him refused and when he tried to do what his conscience compelled him to do, he was fired.

This Court has the power to modify Roe V Wade. This Court could cut a small hole in the wide shadow cast by Roe V Wade to protect the consciences of those who based on science (such as Nathanson, an atheist) or religion or morality believe that abortion is so wrong that they cannot cooperate with it even a little bit.

There are enough weaknesses in Roe V Wade so that this Court should at least carve out an exception to protect those like Rosano. Has there ever before been a U.S. Supreme Court decision which has been so criticized for its ineptness by those who agree with its results? If the Court is to continue to impose its abortion liberty, perhaps another opinion could attempt to shore up the much crit-

icized fallibility of Roe V Wade if it can. Permitting the decision to stand on the multi-faceted quicksand where it now rests continues to do more harm to the prestige of this Court than any other decision since Dred Scott which Roe V Wade so closely resembles.

Let's look at some of the quicksand forming the base of Roe V Wade. In the terminology will be included the many subsequent abortion decisions generated since Roe V Wade by this Court. Subsequently, "Roe V Wade" includes subsequent abortion cases.

As if not expecting anyone to object, Roe V Wade did nothing to protect the conscience of those feeling abortion is wrong who now go to jail in protest in greater numbers than any other cause this century, who protest the anniversary in larger numbers than any other protest or

who like Rosano and others simply lose their job or some other benefit or right. The Court should hear this case and define reasonable lines for those who believe abortion kills a tiny human being and who believe that such killing is so monstrous that they must act or refuse to act.

Roe V Wade rewrote science in that it assumed that viability could never be improved and that science could never improve the evidence that at least certain of the unborn are entitled to the personhood that Congress has bestowed on entities such as corporations and that many environmentalists are curiously arguing should be granted to seals and snail-darters. The viability information in Roe V Wade was grossly inaccurate when Roe V Wade was written, since at that time there was a better than even chance for survival of born, cared for fetuses at the end of the second trimester and there was

certainly no need for granting the right to kill at the end of the third trimester when unwanted pregnancies could be terminated by methods such as inducing birth which were no more dangerous than and probably far safer than saline abortions or dilations and evacuations and the survival rate, if pregnancy had merely been induced would have been nearly one hundred percent.

Roe V Wade rewrote due process since only the neutral state attorney general (who did have a duty to support the law, but none of the particular knowledge necessary to argue abortion) represented the unborn, there was substantially no evidence on behalf of the unborn, advocates of abortion were permitted to put what they wanted into the trial court and to argue the case before the U.S. Supreme Court, while a pro-life Amicus Curiae was denied the right to respond.

This case had many of the characteristics of a stacked deck and one would hope that next time the lives of millions are threatened, the millions might at least have a knowledgeable representative and the opportunity to put forth evidence and to cross-examine witnesses and to point out horrendous defects in studies which are to be relied on by the Court in determining whether or not they die. Instead, in Roe V Wade, studies of doubtful validity were treated as truth and the other defects complained of herein occurred. There was no equivalent of cross-examination which would have pointed out numerous errors which later appeared in the opinion.

The abortion decisions have rewritten biology. Biology defines human to be anything that is the offspring of human parents. Biology defines human as anything that has the potential, such as a

small child, to develop into a mature human being. Biology defines as human anything that has forty-six chromosomes. Biology has other definitions of human, all of which cause the fetus to qualify as human. Certain biologists have expressed certain opinions which have been given great weight by certain justices but none of these opinions relate to the humanity of the unborn, just the value to be placed on what is admittedly human. Biology defines life. Anything that has the potential to reproduce and breathes and feeds and has the potential for spontaneous motions is alive. Again there is no doubt that the fetus is alive just a question of what value is to be put on this life.

Much other similar data is available so there is no doubt that abortion kills human life. Rosano acted as he felt he had to act because he believed the abor-

tion decisions followed a short line of American cases back to Dred Scott via decisions in Nazi Germany and other totalitarian nations which stand for the principle that being a human being has little weight in determining what your rights are, that what is important is how those in power feel about what rights they should give you and that innocent human life can be defined as non-persons who can be killed with impunity if they do nct meet selected standards which standards can, of course, be changed arbitrarily with a gloss of due process by those in power. Rosano is not alone in feeling this way and those like him should get some protection for the conscience from this Court.

The abortion decisions have overlocked much of the common law by omitting the vast majority of common law decisions on the point which may have led

the Court to a different conclusion about the common law. The Court may have relied on, for legal history, a book which pro-lifers believe is only part legal history and part pro-abortion propaganda and certainly does not meet the objective standards which this Court would like to have the public think this Court adheres to.

Roe V Wade rewrote congressional intent in passing the Fourteenth Amendment, since there were nearly one hundred statements about the intended scope about the definition of "person", this entity which was universally agreed to have the widest possible scope. If the Court is not familiar with these hundred statements, it might grant this petition so that Rosano's brief can quote them.

Roe V Wade rewrote congressional understanding of what it had just passed when it passed the Fourteenth Amend-

ment. There are numerous statements indicating that the term "person" is to have a very wide scope, wide enough so there is no doubt that the unborn was to be included. In addition, essentially the same Congress which passed the Fourteenth Amendment also gave its consent to the District of Columbia passing a very tight abortion law which was then tested and found to be constitutional in the Supreme Court of the District of Columbia.

Roe V Wade rewrote the process of ratification of the Fourteenth Amendment since about twenty-five percent of the states ratifying the Fourteenth Amendment tightened their abortion laws within one year of ratification of the Fourteenth Amendment and the other seventy-five percent of the states tightened their abortion laws either shortly before or after ratification of the

Fourteenth Amendment.

As the Court points out in Roe V Wade, all this tightening of abortion laws at about the time of the Fourteenth Amendment was no coincidence, but the Court rewrites the history of why the abortion laws were tightened. If permitted, Rosano will point out certain of the writing of Storrer and certain other historical documents which leave no doubt in any reasonable mind that the tightening of the abortion laws followed scientific discoveries establishing that human life began at conception and did not develop thereafter but simply existed. What did develop were things like capabilities, size, functions, etc. This was perfectly clear to the doctors, legislators, and courts at about the time of the passing of the Fourteenth Amendment, and one wonders what scientific knowledge has since been lost to confuse the

justices about what was perfectly clear a century previous. Rosano hopes that the scientific advances of the past decade might have the same results as the scientific advances of the mid-nineteenth century, and that this Court might for the first time permit itself to be educated on this topic of importance to Rosano and certain others.

Roe V Wade also rewrote the legal and standard dictionary definitions of human life at the time of the Fourteenth Amendment since the word person was defined to include every human being. Roe V Wade also rewrote the definition of person in modern dictionaries which preceded the abortion decision.

The abortion decisions have apparently totally ignored the fact that Congress defined "person" prior to the abortion controversy. The wording of the Fourteenth Amendment and the debates relating

to the Fourteenth Amendment established the fact that those voting for the Fourteenth Amendment intended to give power to Congress to define the meaning of "person" at least when they were going to expand that definition. A century of judicial tradition substantiate the preceding since this Court has acquiesed in congressional expansions of the definition "person", for example in the definition of person to include corporation. If this petition is granted, Rosano will point out how Congress has defined "person"to include the unborn.

CONCLUSION

For the reasons submitted, this Court should grant the petition.

DATED July 18, 1984

Respectfully submitted,

Robert L Sassone

ROBERT L SASSONE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE R. ROSANO,

Plaintiff-Appellant,

v.

SECRETARY OF THE NAVY,

Defendant-Appellee,

No. 83-6384

D.C. # CV-82-0987-JLI

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding
Argued and submitted April 4, 1984

Before: WALLACE, SCHROEDER, and NELSON, Circuit Judges.

Lawrence Rosano appeals the district court's grant of summary judgment in favor of the Secretary of the Navy and against his claim that his termination as a probationary employee was due to religious discrimination. See 42 U.S.C. § 2000e-16 (Supp. V 1981). To establish a prima facie case of discrimination a plaintiff must show that: (1) he was a member of a legally protected group; (2) he was subjected to adverse treatment; (3) his job performance was satisfactory; and (4) he was terminated under circumstances that give rise

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

to an inference of unlawful discrimination. Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981); see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Rosano concedes that after April 7, 1980, he devoted his work time almost exclusively to his abortion concerns. He also does not deny that he spent more than the estimated time on his assigned projects and that his superiors warned him about his lack of output. Therefore, no issue of material fact exists concerning Rosano's lack of satisfactory job performance prior to termination.

Even if Rosano had established a prima facie case, however, an employer's obligation is to make reasonable accommodations for an employee's religious beliefs. Trans

World Airlines, Inc. v. Hardison, 432 U.S. 63, 74-75 (1977). No case has held that reasonable accommodation means that the employer must pay the employee full salary when the employee spends the majority of his time on matters other than his work assignments. See Trans World Airlines, Inc. v. Hardison, 432 U.S. at 84 (requiring an employer to bear more than a de minimis cost to accommodate an employee's religious beliefs is an undue hardship). Under these circumstances, summary judgment in favor of the Secretary was proper.

Affirmed.

State of California)
County of Orange) ss.

ROBERT L SASSONE, being first duly sworn, says:

I am the attorney for petitioner and I was admitted to practice before the U. S. Supreme Court October 26, 1971. On July 20, 1984, I deposited into the United States mail enclosed in sealed envelopes with first class postage thereon fully prepaid at 900 North Broadway, Santa Ana, California the following copies of the present petition addressed as follows:

four copies to:
U.S. Court of Appeals
and Courthouse Building
7th and Mission Streets
PO Box 547
San Francisco, California, 94101

three copies to:
PETER K. NUNUZ
United States Attorney
c/o BETH LEVINE
940 Front Street, room 5-N-19
San Diego, California 92189

forty copies to:
U.S. Supreme Court
1 First St. N.E.
Washington DC 20543

one Copy to:
CLERK-JUDGE IRVING
U.S. Courthouse
940 Front street
San Diego, CA 92189

Robert L Sassone

ROBERT L. SASSONE

Subscribed and sworn to before me on

July 20, 1984 Lawrence D Sassone

LAWRENCE D. SASSONE

OFFICIAL SEAL
LAWRENCE D. SASSONE
NOTARY PUBLIC - CALIFORNIA
ORANGE COUNTY
My Comm. Expires Dec. 27, 1985